

PAMELA R. THOMAS
Claimant

MANOR CARE NURSING CENTER
Respondent

NATIONAL UNION FIRE INS CO NY
Insurance Carrier

ORDER

APPEARANCES

RECORD

STIPULATIONS

ISSUES

Both claimant and respondent appeal from the Award by the Administrative Law Judge raising the issue of the nature and extent of claimant's disability in their respective Request for Review and Notice of Appeal. Respondent also raises, in its brief, the issue of average weekly wage. In addition, both claimant and respondent contend in their briefs that the Administrative Law Judge erred in failing to consider the evidentiary deposition of Dr. Bruce R. Buhr.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board will first address the issue of whether the Award of the Administrative Law Judge took into consideration all of the evidence presented by the parties. Specifically, it is alleged by both claimant and respondent that the Administrative Law Judge failed to consider the testimony of Dr. Buhr. In support of this contention, it is pointed out that the recitation of the record set forth in the August 30, 1995 Award omits the deposition of Bruce R. Buhr, M.D., taken July 24, 1995. Furthermore, in his Award, the Administrative Law Judge states that "[t]he only physician to testify was Edward J. Prostic, M.D." This is obviously an erroneous statement in light of the fact that Dr. Buhr, a physician specializing in orthopedic medicine, also testified in this case. The fact that the Award makes no mention of Dr. Buhr and further describes Dr. Prostic as the only physician to testify, convinces the Appeals Board that the omission of the deposition of Dr. Buhr from the recitation of the record was not simply a clerical error, but instead shows that the testimony of Dr. Buhr was not considered by the Administrative Law Judge.

Respondent took the evidentiary deposition of Dr. Buhr on July 24, 1995, which was in advance of its terminal date of August 7, 1995. A transcript of Dr. Buhr's testimony is filed, stamped received by the Division of Workers Compensation on August 25, 1995. Although the Award by the Administrative Law Judge was not entered until August 30, 1995, it is clear that Dr. Buhr's deposition was overlooked. A central issue to this case, both before the Administrative Law Judge and on review before the Appeals Board is the nature and extent of claimant's disability, including whether claimant is entitled to a work disability in excess of her functional rating. Dr. Buhr's testimony concerns his examination and treatment of claimant's work injury. It further includes expert medical opinion testimony concerning claimant's loss of task performing ability. The Appeals Board concludes that consideration of Dr. Buhr's testimony is crucial to a determination of the issue of the nature and extent of claimant's disability.

K.S.A. 44-523 provides that the parties shall be given a reasonable opportunity to be heard and to present evidence. Director's Rule 51-3-8 provides: "Evidence shall be confined to the matters actually ascertained to be in dispute." It further states that: "All parties shall be given reasonable opportunity to be heard." In Lawrence Preservation Alliance, Inc. v. Allen Realty, Inc., 16 Kan. App. 2d 93, 819 P.2d 138 (1991), rev. denied 250 Kan. 805 (1992), the Court of Appeals indicated that a failure to examine relevant factors, when required by statute, renders the administrative action arbitrary and capricious.

Having concluded that relevant testimony was not considered by the Administrative Law Judge, the question becomes what remedy should the Appeals Board provide? Under the law as it existed prior to the 1993 amendments to the Kansas Workers Compensation Act, de novo review by the District Court would have included deciding the issues presented utilizing the entire record, including the testimony improperly not considered by the Administrative Law Judge. K.S.A. 1992 Supp. 44-556 allowed judicial review by the

District Court of any decisions by the Director. Subsection (b) provided: "On any such review the district court shall have jurisdiction to grant or refuse compensation, or to increase or diminish any award of the director as justice may require." In the case of Houston v. Kansas Highway Patrol, 238 Kan. 192, 708 P.2d 533 (1985), the Kansas Supreme Court considered K.S.A. 44-556(b) and prior case law and concluded that the District Courts lack authority to remand a case to the Administrative Law Judge. However, under current law, K.S.A. 44-551(b)(1) as amended by S.B. 59 (1995), provides:

"Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation *or to remand any matter to the administrative law judge for further proceedings.*" (emphasis added)

The 1993 Kansas Legislature saw fit to include as a part of the de novo review authority of the Appeals Board, the authority to remand a matter to the Administrative Law Judge. It should be noted that the Appeals Board believes that in the interest of judicial economy and the expeditious administration of justice, this remand authority should be used sparingly. It is not necessary nor required that this matter be remanded to the Administrative Law Judge for a re-determination in order to afford the parties due process of law. "Basic elements of procedural due process of law are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." Peck v. University Residence Committee of Kansas State Univ., 248 Kan. 450, 467, 807 P.2d 652 (1991). A full and meaningful hearing can be held before the Appeals Board pursuant to its standard of de novo review upon the whole record. Rios v. Board of Public Utilities of Kansas City, 256 Kan. 184, 883 P.2d 1177 (1994). Due process does not require that a party be given a second chance to try its case. In re Marriage of Soden, 251 Kan. 225, 834 P.2d 358, cert. denied ___ U.S. ___, 121 L. Ed. 2d 540 (1992). The Appeals Board believes that the facts of this case present a situation where remand is warranted in order that the Award being presented for review by the Appeals Board can be considered as a review of a decision based on the entire record and all of the relevant evidence.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this case should be, and is hereby, remanded to the Administrative Law Judge for reconsideration and a decision based upon the entire record. The Appeals Board does not retain jurisdiction over this matter and the parties must file a new application for review and follow the appropriate procedures, should they be aggrieved, after they receive the additional findings and award from the Administrative Law Judge should an aggrieved party desire the Appeals Board to provide further review.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

I disagree with the decision to remand this claim. In my opinion, remand is neither a required nor a preferred option. Remand is not required because the Appeals Board has the same authority to conduct a de novo review as the District Court prior to the 1993 amendments. The District Court would have had no option under the same circumstances. The only available remedy would have been to review the record, including the deposition of Dr. Buhr, and decide the case. See Houston v. Kansas Highway Patrol, 238 Kan. 192, 708 P.2d 533 (1985). The Appeals Board now has authority to remand. The addition of the authority to remand should not, however, diminish the scope of the authority to conduct a de novo review.

The authority to remand should be treated as discretionary and shall be exercised only after weighing the interests involved. Remand is not a preferred option in this case because it results in a delay not warranted by any benefits to remand. One of the purposes of the Workers Compensation Act is to expeditiously resolve claims. Helms v. Pendergast, 21 Kan. App. 2d 303 (1995). The delay occasioned by remand is likely to be substantial. The remand will resolve only one of several issues raised on appeal. A second appeal may then be necessary to resolve the other issues. In fact, the Board will, in the end, likely also consider the deposition of Dr. Buhr and its effect on the findings of fact. I think the Board should do so now, rather than later. Remand serves only to duplicate the effort and delay the resolution of the issues.

BOARD MEMBER

c: Kelly Johnston, Wichita, Kansas
Stephen J. Jones, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director